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IN THE SUPREME COURT OF
THE UNITED STATES

No. _____

JACK SIMMONS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE
FIFTH CIRCUIT

Petitioner, Jack Simmons, prays that a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above styled case on 12 July 1974. A petition for rehearing was filed and the same was denied on 8 August 1974.

OPINIONS BELOW

No opinion was rendered by the United States District Court, Middle District of Florida, Jacksonville Division but a decree was issued 7 December 1973 which sets forth the trial court's findings and legal conclusions in this matter and is Appendix A hereto. The opinion of the United States Court of Appeals for the Fifth Circuit issued 12 July 1974 is Appendix B hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was pronounced on 12 July 1974 denying the appeal of petitioner of the order of the district court denying petitioner's motion to withdraw his guilty plea. A petition for rehearing was denied by the United States Court of Appeals for the Fifth Circuit on 8 August 1974.

Petitioner has no further appellate remedy under the laws of the United States.

The jurisdiction of this Court is involked under 28 USC 1254(1).

QUESTION PRESENTED

Whether the trial court erred in not allowing the guilty pleas to be withdrawn before sentencing when it was shown to the Court that the sole basis of the defendant's decision to plead guilty was the government's promise to

dismiss thirteen other counts against him, coupled with representation of his lawyer that he would get a probated sentence if he plead guilty to two charges.

STATUTES INVOLVED

18 USC 1581(a) Peonage; obstructing enforcement -- Whoever holds or returns any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 USC 1584 Sale into involuntary servitude -- Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Federal Rules of Criminal Procedure, Rule 11, Title 18 United States Code (as amended February 28, 1966)

"Rule 11. Pleas

A defendant may plead not guilty, guilty or, with consent of the court, nolo contendere. The Court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and

the consequence of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

Federal Rules of Criminal Procedure, Rule 32d, Title 18 United States Code

"Rule 32(d) Withdrawal of Plea of Guilty.

A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct monifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

STATEMENT OF THE CASE

I. Procedural History of the Case

Petitioner was indicted on 15 June 1972 and charged with fifteen counts of violations of Sections 1581(a) (peonage) and 1584 (involuntary servitude) of Title 18 United States Code. At arraignment on 25 August 1972, petitioner entered a plea of not guilty to each of the fifteen counts. Trial was set for 13 November 1972 and petitioner withdrew pleas of not guilty to counts 8 and 9 of the indictment and guilty pleas were accepted by the court with the understanding the other thirteen

counts would be dismissed at sentencing. Petitioner was adjudged guilty of counts 8 and 9.

Sentencing was set for 6 April 1974 and petitioner moved for permission to withdraw pleas of guilty to counts 8 and 9 at that time. A hearing was held on the motion on 16 April 1973 and the motion was denied on 4 December 1973. Petitioner was sentenced on 3 January 1974 to four years imprisonment on each of the two counts, with the sentences to run concurrently. Counts 1 through 7 and 10 through 15 were dismissed.

A notice of appeal was filed in the United States Court of Appeals for the Fifth Circuit presenting the issue of refusal of the trial court to grant petitioner's motion to withdraw his pleas of guilty to counts 8 and 9 of the indictment. The United States Court of Appeals for the Fifth Circuit affirmed the decree of the trial court on 12 July 1974 and denied petitioner's motion for a rehearing on 8 August 1974.

II. Facts Material to the Question Presented

Petitioner is a member of the Negro race, who although he completed the sixth grade of school is substantially without formal eduction, and only able to read and write a little. Despite this lack of education, he has succeeded in the operations of a migrant farm labor pool in Panoma, Florida, from which he provides laborers to local farmers and has been conducting such business for the past

four or five years.

Petitioner engaged Angus W. Harriett, a Palatka, Florida, lawyer to represent him in the charges against him and while admitted to practice before the United States District Court for the Middle District of Florida, Mr. Harriett was not too familiar with the Federal rules.

Two weeks before the scheduled trial petitioner engaged Rutledge Liles, a Jacksonville, Florida, lawyer, to try the case with Angus W. Harriett. Mr. Liles was an experienced trial lawyer familiar with the Federal rules.

About a month prior to the trial date, Mr. Harriett advised petitioner to enter a plea of guilty, but petitioner "didn't much like the idea."

On November 13, 1972, the petitioner was again urged by Mr. Harriett to enter a plea of guilty and was advised by Mr. Harriett that he would most likely receive probation of any sentence to imprisonment because the petitioner had a good record. The petitioner's brother (one not charged with any criminal conduct) had reviewed some of the evidence against petitioner and advised petitioner he would be found guilty. This statement was made in the presence of both counsel. Mr. Liles indicated the U. S. Attorney was considering the possibility of a plea of guilty to one count. Mr. Liles in the presence of the petitioner and Mr. Harriett called the U. S. Attorney assigned to prosecute the charges against petitioner and negotiated a plea of guilty to two

counts in return for a motion to dismiss the other thirteen counts and an assurance the U. S. Attorney would make no recommendation as to punishment at sentencing. The U. S. Attorney was prepared to present evidence in support of seven of the fifteen charges.

Following the bargain made for the plea of guilty to two counts, the parties appeared before the Court and petitioner moved to withdraw his plea of not guilty to counts 8 and 9 and to enter pleas of guilty thereto.

At the 13 November 1972 hearing the court ascertained the other thirteen counts would be dismissed at sentencing and that this had been discussed between counsel. He ascertained no discussion had been made between counsel regarding the sentence that might be imposed.

Prior to accepting the pleas of guilty to counts 8 and 9, the Court addressed the petitioner and received affirmative responses regarding petitioner's satisfaction with the representation and advice of his counsel, his understanding of the maximum punishment, whether the plea was his independent decision, his understanding that the plea of guilty admits the truth of the charge against him, that by pleading guilty he waived trial by jury, and that he was satisfied the Government could make out a case against him.

The record of the hearing shows the following regarding petitioner's decision to plead guilty:

"The Court: Is it in any way influenced by any threats or offers of reward or promises of any kind?

Mr. Simmons: No, Sir."

The record shows that an FBI agent read from a report of investigation which included two statements of witnesses in the report. Thereafter the Court asked petitioner if he admitted the truth of the report of the FBI agent and the petitioner responded in the affirmative. He was not asked whether these facts contained in the statements of the witnesses were true.

At no time does the record show petitioner was advised by the Court of the elements of the offenses charged.

Although there is testimony by petitioner's lawyers, Mr. Harriett and Mr. Liles, that they had discussed the offenses with petitioner, there is no evidence either had advised petitioner of the specific elements of either offense.

That petitioner at the hearing into this withdrawal of his plea on 16 April 1973 asserted he did not understand the serious nature of the offenses charged against him, that he was in fact not guilty of the offenses charged and had so advised Mr. Harriett prior to entering pleas of guilty, that he entered pleas of guilty after being urged to do so by Mr. Harriett and on the advice of Mr. Harriett that he would receive a probated sentence.

BASIS OF FEDERAL JURISDICTION

Indicted for violation of Sections 1581(a) and 1584 of Title 18, United States Code.

ARGUMENTS

Certiorari should be granted in the instant case because this Court has ruled that a guilty plea must not be accepted unless the guilty plea is truly voluntary and the record shows all the factors that make it voluntary whereas the Court of Appeals has ruled that a hearing in which a plea of guilty is accepted is complete even though the accused is not advised of the elements of the offense charged nor is it ascertained he understood that his acts constituted the offenses to which he pleaded guilty and when all parties knew the pleas of guilty were negotiated and no weight was given to the true motivation for the guilty pleas.

Rule 11 of the Federal Rules of Criminal Procedure expressly directs the trial court to make two fundamental inquiries: one, whether a defendant who pleads guilty understands the nature of the charges against him and two, whether he is aware of the consequences of his plea.

In discussing Rule 11, this Court stated in McCarthy v. United States, (1969) 394 U.S. 459, at pages 467 and 468: "The nature of the inquiry required by Rule 11 must necessarily vary from case to case, and, therefore, we do not establish any general guidelines other

than those expressed in the Rule itself. As our discussion of the facts in this particular case suggests, however, where the charges encompass lesser included offenses, personally addressing the defendant as to his understanding of the essential elements of the charge to which he pleads guilty would seem a necessary prerequisite to a determination that he understands the meaning of the charge. In all such inquiries '[m]atters of reality, and not mere ritual should be controlling.' Kennedy v. U.S., 397 F.2d 16, 17 (C.A. 6th Cir. 1968)." (Emphasis ours)

No where in the record did the trial Court personally address the defendant as to his understanding of the essential elements of the charges to which he plead guilty. It rather centered its questioning on whether the defendant was aware of the maximum punishment ascribable to the offenses charged.

This Court stated further in McCarthy v. U.S., (supra), "At the time the plea was entered, petitioner's own replies to the Court's inquiries might well have attested to his understanding of the essential elements of the crime charged, including the requirement of specific intent and to his knowledge of the acts which formed the basis for the damages." (Emphasis ours)

It is submitted that the record is devoid of any such responses. The petitioner plead guilty to one count of peonage and to one count of involuntary servitude. No where is he told what this is. No where is he told what specific

criminal intent he must possess, but worse yet no where is he asked to explain what conduct and acts by him constitute the crimes to which he plead guilty so that the Court or a reviewing Court could intelligently assess the quality of his understanding of the responses to the questions asked.

The ritualistic question, "Is it [the guilty plea] in any way influenced by any threats or offers of reward or promises or hopes of lightened punishment of any kind?" was asked at the hearing held on November 13, 1972. To said question the reply was "no." This answer was clearly erroneous for not three minutes before this inquiry the Court was informed that the plea had been negotiated, that the defendants plea of guilty or that is to say if the petitioner would change his "not guilty" plea to guilty to two charges the government would dismiss thirteen charges against him. This clearly was a "promise of reward" for so pleading.

It is contended that upon receiving this erroneous answer the Court should have made a more serupulous inquiry and in not doing so demonstrated its lack of concern as to "inquiries about matters of reality and its obsession with mere ritual."

In the case at bar, a plea of guilty had been negotiated between counsel for the defendant and the U. S. Attorney and it only remained for the plea to be accepted by the Court. However, the evidence shows petitioner at no time admitted to his counsel his guilt of the offenses and it is apparent his pleas of guilty were induced solely by an agreement

whereby thirteen of the counts against him would be dismissed if he plead guilty to two counts. Additionally, petitioner was influenced by the representation of his counsel that he would get a probated sentence. His plea of guilty was not impelled by his free and voluntary admission of guilt but was influenced solely by the benefits flowing to him from the agreement with the U. S. Attorney.

At the hearing to accept his pleas of guilty, the court and all counsel knew the pleas of guilty were in exchange for the dismissal at sentencing of the other thirteen counts. Petitioner answered all questions asked by the Court in a manner to obtain acceptance of his pleas of guilty and when asked if his guilty plea was in any way influenced by any threats or offers of rewards or promises of any kind, he responded in the negative. All counsel present knew this answer was erroneous and kept silent. The trial judge knew thirteen counts were to be dismissed in return for the pleas of guilty to two counts and he accepted the false answer of petitioner without pursuing other lines of inquiry which may have shown petitioner may not have understood the question or that his plea may in fact have not been voluntary. Careful inquiry was clearly indicated to determine if the pleas of guilty were voluntarily given and that the petitioner was in fact guilty as to determine of the pleas of guilty were induced by the plea bargain and that the petitioner did not consider himself in fact guilty.

On the basis of the record at the time the pleas of guilty were entered and

the evidence submitted following the motion to withdraw the guilty pleas the trial court clearly abused its discretion when it then denied petitioner the privilege to withdraw pleas of guilty.

Such a practice, condoned by the Court of Appeals, does not comply with the requirements set forth in Boykin v. Alabama (1969), 395 U.S. 238, where this Court stated at page 243, "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought (Garner v. Louisiana, 368 U.S. 157, 173; Specht v. Patterson, 386 U.S. 605, 610), and forestalls the spin-off of collateral proceedings that seek to probe murky memories."

Neither does the practice condoned by the Court of Appeals meet the ABA Standard Relating to Pleas of Guilty, Section 1.5 at pp. 7-8, 29:

"The court should not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary. By inquiry of the prosecuting attorney and defense counsel, the court should determine whether the tendered plea is the result of prior plea discussion and a plea agreement, and, if it is, what agreement has been reached. If the prosecuting attorney has agreed to seek charge or sentence concessions which must

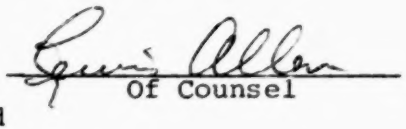
be approved by the court, the court must advise the defendant personally and determine whether any other promises or any force or threats were used to obtain the plea."

In approving the order of the trial judge in this case, the United States Court of Appeals for the Fifth Circuit, notwithstanding the statement to the contrary in its opinion, declined to give effect to those decisions which state that the right of a defendant to withdraw a plea of guilty prior to sentencing under Rule 32d, Federal Rules of Criminal Procedure should be liberally construed. See Kircheval v. United States, (1927) 274 U.S. 220; 2 C. Wright, Federal Practice and Procedure, Criminal Section 538, at 474-75 (1969); Kadwell v. United States (9th CCA, 1963), 315 F.2d 667; United States v. DeCavalcante, (3rd CCA, 1971) 449 F.2d 139; and United States v. Webster (9th CCA, 1972) 468 F.2d 769.

Why should the Supreme Court of the United States hear this case? It should hear this case to insure that all persons charged with offenses, who are influenced to enter pleas of guilty after plea bargaining, enter such pleas of guilty freely and voluntarily and that if the record does not show conclusively that the plea was freely and voluntarily given that the plea may be withdrawn at any time before sentencing. The administration of criminal justice in the United States will be improved with a clear statement from this court regarding the withdrawal of guilty pleas before sentencing when there has been a negotiated plea.

Therefore, petitioner respectfully requests that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

JACK SIMMONS, JR.



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1. Order of United States District Court, Middle District of Florida, Jacksonville Division, dated December 4th, 1973.

2. Hearing of April 6th, 1973 (TR. 2 through 8).

3. Hearing of April 16th, 1973 - Testimony of Angus Harriett (TR 8 through 12, 14 through 16, 18, 20, 27 through 29).

4. Hearing of April 16th, 1973 - Testimony of Jack Simmons, Jr. (TR. 30 through 32, 39 through 42, 44, 49 and 63).

5. Hearing of April 16th, 1973 - Testimony of Rutledge R. Liles, (TR. 69, 70, 75, 76, 78, 81 and 84).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v

NO. 72-130-Cr-J

JACK SIMMONS, Jr.

ORDER

On April 6, 1973 defendant appeared before this Court for sentencing and, prior to the imposition of sentence, moved to withdraw his plea of guilty. The Court deferred further proceedings until April 16, 1973 when a hearing was held on this motion. The Court has reviewed the transcript of that hearing and the memoranda subsequently filed by counsel and makes the following findings:

1. On June 15, 1972 defendant was indicted on fifteen counts of involuntary servitude and peonage in violation of Title 18, United States Code, Sections 1584 and 1581(a). Also on June 15, 1972 defendant's brother, Willie Simmons, was indicted in a separate indictment on six counts of involuntary servitude and one count of peonage. See United States v. Willie Simmons, Case No. 72-129-Cr-J-T. Trial in both cases was set for the week of November 13, 1972. On the afternoon of November 13, 1972 defendant entered a plea of guilty to Counts 8 and 9 of the indictment. Willie Simmons had previously plead guilty to one count of the indictment in his case on November 6, 1972. When defendant entered his plea of guilty he was carefully questioned by the Court as required by Rule 11, Federal Rules of Criminal Procedure. The defendant fully understood the maximum penalty that could be imposed in consequence of the plea. The Court found that defendant's plea was factually based and freely, intelligently, and voluntarily made.

2. Defendant entered his plea of guilty on the morning the case was set for trial. He knew that the prosecution was prepared to go forward. At great expense and with considerable difficulty the Government had secured the presence of sufficient witnesses to go to trial on seven of the fifteen counts charged in

the indictment. Most of the witnesses were transients who had been difficult to locate. Subsequently, in reliance upon the guilty plea, the Government released and no longer maintained contact with these witnesses.

3. Defendant's decision to plead guilty was based, in part, upon the advice of his privately retained counsel that a plea of guilty would probably result in a sentence of probation. However, no promises or representations concerning sentence had been made by the Government or the Court. Defendant was told and he understood that no promises or representations had been made and that the advice of his counsel was based solely on counsel's private feelings.

4. On April 6, 1973 Willie Simmons and defendant both appeared for sentencing. Prior to sentencing defendant's counsel, Angus W. Harriett, had decided that if it appeared that defendant would not receive a sentence of probation an attempt would be made to withdraw the guilty plea. Rutledge R. Liles, an attorney who had been employed as trial counsel only, was not a party to their plan. Willie Simmons was sentenced first, receiving a sentence of four years imprisonment with special parole eligibility upon the service of one year pursuant to Title 18, United States Code, Section 4208 (a) (1). Based upon the sentence given Willie Simmons, Harriett determined that a sentence of probation was unlikely and thus moved to withdraw the guilty plea when defendant was called forward to be sentenced.

5. Defendant's plea of guilty entered on November 13, 1972 was not converted into a revocable plea because it had been induced, in part, by the personal opinion of counsel that it would result in a sentence of probation. See Holland v. United States, 406 F. 2d 213 (5th Cir. 1969). The guilty plea was factually based and freely, intelligently, and voluntarily made. Simply because defendant does not receive the sentence he thought would be imposed does not entitle him to withdraw the plea. See Brady v. United States, 397 U.S. 742 (1970).

6. Defendant has failed to demonstrate adequate cause for permitting the withdrawal of the plea, particularly in light of the probable prejudice to the Government in attempting to prepare for trial after having discontinued contact with witnesses extremely difficult to locate. See United States v. Del Valle-Rojas, 463 F. 2d 229 (9th Cir. 1972) and United States v. Vasquez-Velasco, 471 F. 2d 294 (9th Cir. 1973).

Accordingly, it is

ORDERED:

1. Defendant's motion to withdraw his plea of guilty is denied.

2. Sentencing is hereby set for 4:30 o'clock P.M. on Tuesday, December 18, 1973 in Courtroom No. 1, United States Courthouse and Post Office Building, Jacksonville, Florida.

DONE and ORDERED at Jacksonville, Florida this 4th day of December, 1973.

UNITED STATES DISTRICT JUDGE

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United States Marshal
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United States Probation Office
Jacksonville, Florida

UNITED STATES of America, Plaintiff-Appellee,

v.

Jack SIMMONS, Jr., Defendant-Appellant.

No. 74–1173
Summary Calendar.*

**United States Court of Appeals,
Fifth Circuit.**

July 12, 1974.

By a judgment of the United States District Court for the Middle District of Florida, at Jacksonville, Gerald B. Tjoflat, J., the defendant was convicted on two counts of involuntary servitude and he appealed seeking to reverse order which denied his motion to withdraw his guilty plea. The Court of Appeals, Goldberg, Circuit Judge, held that the trial court did not abuse its discretion in refusing to allow defendant, who waited until after his brother, who had pled guilty to a similar indictment, had been sentenced to prison before making motion, to withdraw of guilty plea.

Affirmed.

1. Criminal Law ⇐274(2)

Even prior to imposition of sentence an accused has no absolute right to withdraw guilty plea and a grant or denial of such motion is within sound discretion of trial court. Fed. Rules Crim.Proc. rules 11, 32(d), 18 U.S.C.A.

2. Criminal Law ⇐274(1)

Rule relating to right of defendant to withdraw pleas of guilty or nolo contendere should be liberally construed. Fed. Rules Crim.Proc. rules 11, 32(d), 18 U.S.C.A.

* Rule 18, 5 Cir.; *see* Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

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3. Criminal Law ⇐274(2)

Trial court did not abuse discretion in refusing to allow defendant, who entered plea of guilty without any representation by counsel that a deal had been made and who did not move to withdraw plea until after defendant's brother, who had pled guilty to similar indictment, was sentenced to prison, to withdraw his plea of guilty.

4. Criminal Law ⇐274(6)

Record showing the success of defendant, who entered plea of guilty to two counts of involuntary servitude, as an entrepreneur while operating a migrant farm labor camp for several years refuted argument that his motion to withdraw guilty plea should have been granted because he was functionally illiterate and entered the plea in an arena which instilled fear. Fed.Rules Crim.Proc. rules 11, 32(d), 18 U.S.C.A.

Appeal from the United States District Court for the Middle District of Florida.

Before WISDOM, GOLDBERG and GEE, Circuit Judges.

GOLDBERG, Circuit Judge:

Appellant, Jack Simmons, Jr., was indicted on fifteen counts of violating the involuntary servitude and peonage statutes.[1] On November 13, 1972, the day his case was set for trial, appellant entered a plea of guilty to two counts of the indictment. After careful questioning pursuant to Rule 11, Fed.R.Crim.P., the district court found that appellant's plea was freely, intelligently, and voluntarily made. On April 6, 1973, when he was called forward to be sentenced, appellant,

1. 18 U.S.C. §§ 1584 and 1581(a).
§ 1584. Sale into involuntary servitude
Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

through his attorney Angus Harriett, moved to withdraw his guilty plea.[2] After a full hearing on April 16, 1973, the court denied the motion. On January 3, 1974, the court sentenced appellant to four years imprisonment on each of the two counts to which he had pleaded guilty, the sentences to run concurrently. On this appeal we have been asked to reverse the order of the district court denying appellant's motion to withdraw his guilty plea. We decline.

[1] Appellant bases his claim for relief on Rule 32(d), Fed.R.Crim.P., which provides:

> A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

It is the well-settled rule in this Circuit that, even prior to the imposition of sentence, an accused has no absolute right to withdraw a guilty plea, and that the grant or denial of such a motion is within the sound discretion of the trial court. United States v. Valdez, 5 Cir. 1971, 450 F.2d 1145; United States v. Arredondo, 5 Cir. 1971, 447 F.2d 976, cert. denied, 404 U.S. 1026, 92 S.Ct. 683, 30 L.Ed.2d 676; Kirshberger v. United States, 5 Cir. 1968, 392 F.2d 782.

§ 1581. Peonage; obstructing enforcement

> (a) Whoever holds or returns any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The truncated record on appeal reveals little about the specific charges in the indictment. The transcript of the Rule 11 proceeding, however, indicates that the charges arose out of appellant's operation of a migrant farm labor camp at Pomona Park, Florida. There was testimony to the effect that workers recruited by appellant were forced at gunpoint to return to the camp and "work off" money allegedly owed to appellant.

2. Rutledge Liles, an attorney who had been employed as trial counsel only, refused to join in the motion; Liles sought and was granted permission to withdraw as counsel in the case.

[2] Conceding that discretion rests with the trial judge, appellant urges that Rule 32(d) should, nevertheless, be liberally construed; and he has mustered formidable authority to support his contention. Almost fifty years ago the Supreme Court declared that "[t]he court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just." Kercheval v. United States, 1927, 274 U.S. 220, 224, 47 S.Ct. 582, 583, 71 L.Ed. 1009. The rationale for such a policy is that the public interest in protecting a defendant's right to trial by jury usually outweighs any inconvenience that the court or the prosecution is likely to suffer as a result of a withdrawn plea prior to sentencing. *See* Kadwell v. United States, 9 Cir. 1963, 315 F.2d 667.[3] Noting these considerations, Professor Wright has proposed that courts allow pre-sentencing withdrawals of guilty pleas virtually as a matter of course "unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea." 2 C. Wright, Federal Practice and Procedure, Criminal § 538, at 474–75 (1969). In United States v. Presley, 5 Cir. 1973, 478 F.2d 163, 167, we noted our adherence to "the general principle that Rule 32(d) should be construed liberally in favor of the accused when a motion is made to withdraw before sentence is imposed."

[3] Appellant's statement of the law is very persuasive. Unfortunately for him, even under the most enlightened application of Rule 32(d), the facts of his case do not justify the conclusion that the district court erred in refusing to

3. The Court in *Kadwell* contrasted the public interest in freely granting pre-sentencing motions to change pleas with the factors involved in considering post-sentencing motions:

> But if a plea of guilty could be retracted with ease after sentence, the accused might be encouraged to plead guilty to test the weight of potential punishment, and withdraw the plea if the sentence were unexpectedly severe. The result would be to undermine respect for the courts and fritter away the time and painstaking effort devoted to the sentencing process.

315 F.2d at 670.

permit the guilty plea to be withdrawn. First, in recommending a guilty plea appellant's counsel made no representation to him that any deal had been made, but merely expressed his opinion that appellant would receive only a probated sentence. Only after appellant's brother Willie Simmons—who had pleaded guilty to one count of a similar indictment and who appeared with appellant for sentencing—was sentenced to four years imprisonment, did appellant move to withdraw his guilty plea.[4] To have granted the motion under these circumstances would have been to permit appellant to use the guilty plea as a means of testing the weight of the potential sentence—a primary policy ground for denying plea changes. *See* footnote 3, *supra*.

Another important factor supporting the trial court's order in this case is the likelihood of substantial prejudice to the prosecution. In issuing its order, the district court made the finding that, as of the day the case was set for trial:

> At great expense and with considerable difficulty the Government had secured the presence of sufficient witnesses to go to trial on seven of the fifteen counts charged in the indictment. Most of the witnesses were transients who had been difficult to locate. Subsequently, in reliance upon the guilty plea, the Government released and no longer maintained contact with these witnesses.

Locating those witnesses again would be extremely onerous and, in many cases, perhaps impossible.

[4] Finally, appellant's argument that the court should have granted his motion because he is functionally illiterate,

4. Rising to object to continuing with the sentencing procedure and to move for permission to withdraw the guilty plea, Mr. Harriett stated:

> I felt like in representing Jack Simmons, when we entered the plea of guilty to two counts of the involuntary servitude, that Jack's record would warrant probation. I still think his record would warrant probation, and we have a goodly number of witnesses here to testify as to his record, but obviously having been in Court when Willie was just sentenced, I think I probably gave Jack bad advice in entering his plea of guilty to two counts.

has had no formal education, and was in "an arena that instills fear," is amply refuted by the record concerning his apparent success as an "entrepreneur." Appellant operated a migrant farm labor camp for several years, never employing fewer than fifteen people and averaging gross revenues of $1200 to $1300 per week. In light of these facts, we are convinced that the court's finding that the guilty plea "was factually based and freely, intelligently, and voluntarily made" is not clearly erroneous.

Recognizing the care with which the district court accepted appellant's guilty plea,[5] the basis upon which its withdrawal was sought, and the likelihood of substantial prejudice to the government, we conclude that the district court did not abuse its discretion in denying appellant's motion to withdraw his plea.

Affirmed.

5. Mr. Fine, who represented appellant at the hearing on the motion to withdraw the guilty plea, attested to the fairness and thoroughness of the Rule 11 proceeding:

> I might state for the record, may it please the Court, so far as this Honorable Court is concerned in doing that, we do not feel, if Your Honor please, that the Court could have asked any other questions that would have materially helped the situation.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-1173

FILED
AUG 8 1974
EDWARD W. WADSWORTH, CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JACK SIMMONS, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING

(August 8 , 1974)

Before WISDOM, GOLDBERG and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.